No. 17-2

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

MICROSOFT CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 40 MEDIA ORGANIZATIONS, IN SUPPORT OF RESPONDENT

Laura R. Handman
Alison Schary
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave. NW,
Suite 800
Washington, D.C. 20006
laurahandman@dwt.com
(202) 973-4200

Bruce D. Brown
Counsel of Record
Caitlin Vogus
Selina MacLaren
REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1250
Washington, D.C. 20005
bbrown@rcfp.org
(202) 795-9300

(Additional counsel for amici listed in Appendix B)

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STATEMENT OF INTEREST[1]

Amici curiae are the Reporters Committee for Freedom of the Press (the "Reporters Committee") and 40 news media organizations and trade organizations that support and represent journalists and publishers who work worldwide.[2] News media organizations and reporters rely on technology, including email and cloud-based storage services, provided by companies like Microsoft to report on issues of public interest around the world. They also routinely rely on press protections codified in U.S. law that shield newsgathering from government intrusion. By distinguishing between different types of legal process, such as subpoenas and warrants, these protections restrict prosecutorial power in meaningful ways. *Amici* urge the Court to consider how the outcome in this case might impact those press protections and encourage reciprocal demands for information by foreign governments, chilling important reporting to the detriment of an informed public.

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the *amici curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and letters consenting to the filing of *amicus* briefs are on file with the Clerk of the Court.

[2] The names and brief descriptions of individual *amici* are provided in Appendix A.

SUMMARY OF ARGUMENT

Twenty-first century journalism is a global and networked endeavor, powered by technology. Reporters rely on technology to communicate with their sources by email, store and share newsgathering materials in cloud-based storage devices, and work collaboratively on stories from remote locations. Even before the modern newsroom migrated to the cloud, governments sought to "annex the journalistic profession as an investigative arm of government," demanding the materials journalists gathered and drafted in the course of reporting the news. *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

While the subscriber at issue may not be a journalist, the Court's decision in this case will necessarily impact all users of cloud-based platforms, including the journalists employed and represented by *amici*. Today, with journalists' work product necessarily in the hands of third-party service providers, technology makes the threat of that annexation all the more possible.

Amici's concern is not merely domestic. The journalists employed by *amici*, or on whose behalf *amici* advocate, work all over the world, reporting on topics that may be of particular interest to governments, including foreign governments hostile to press rights. The United States has long been the standard-bearer for these freedoms by, *inter alia*, recognizing the sensitivity of reporter work product and reporter-source communications. Especially in light of the current dangerous global climate for reporters, it is imperative that the United States

continues to model jurisdictional restraint lest foreign nations are emboldened to target journalists through their own demands for information.

Finally, *amici* emphasize that there are meaningful distinctions between "warrants" and "subpoenas" that undergird other laws upon which members of the press rely for protection. Altering the meaning of these long-defined terms in this case may have consequences beyond the Stored Communications Act (SCA), 18 U.S.C. § 2701 *et seq.*, blurring the line between "warrant" and "subpoena" to create a hybrid form of process with the worst of both worlds — expansive scope and uncertain rules.

In sum, *amici* urge the Court, when deciding this case, to consider the impact of its decision on the ability of the news media to report on stories of public interest around the world. Maintaining the strong free-press protections of U.S. law will discourage other countries with less regard for an independent press from reaching across their own borders to chill important reporting.

ARGUMENT

I. Journalists must be able to protect sensitive reporting materials in the modern digital newsroom, which resides in the cloud.

Members of the news media routinely store their data and communications in the cloud as they gather and report the news to the public, and they have an acute interest in safeguarding the confidentiality of their reporting materials. Because newsrooms rely on cloud-based tools, any changes to the legal regime governing the security of data stored with technology companies will impact journalists and news organizations.

Modern communications technology is indispensable to twenty-first century newsgathering. Reporters use email and cloud-based storage services to communicate with sources and editors, conduct research, draft stories, track drafts during the editing process, store and send video and photos, write code, build data visualizations such as infographics, prepare posts for social media, interact with audiences, and other functions essential to modern newsgathering and reporting.

For example, cloud-based technology allows newsrooms to overcome distance. The managing editor for the *Hannibal Courier-Post* explained how the use of a cloud-storage service, Google Drive, helped harmonize the work of two sister publications, allowing the remote groups to review proofs and the daily online budget, share resources, and reach a larger online audience. Tim Schmitt, *Remote locations? Here's how Google Drive can bring*

newsrooms together, Gatehouse Newsroom (Sep. 22, 2016), https://perma.cc/YE9G-PZAJ. Cloud-based technology "allow[ed] every member of the editorial [team] to be involved in the digital planning process." *Id.* Similarly, Indonesia's largest news organization used Microsoft 365, a cloud-based email, file-sharing, and office suite tool, to collaborate on stories by sending information, photographs, and drafts from the field to the newsroom, discussing changes to stories with editors, and creating videos and other multimedia. *Indonesia's biggest media company saves 28% IT investment cost through cloud transformation*, Microsoft (Nov. 16, 2016), https://perma.cc/JN8M-9P3W.

Newsrooms increasingly store their data on platforms operated by technology companies rather than hosting their own servers, which means that a great deal of newsgathering activity is routed through and stored by companies like Microsoft. *See* Ashkan Soltani (@ashk4n), Twitter (Mar. 24, 2014, 7:32 AM), https://perma.cc/AQ4T-UGVB (independently conducted research on file with *amicus* Reporters Committee showing that nearly half of 25 news sites evaluated used Google or Microsoft to host their email). Although these products help reporters bring the public more newsworthy information at a faster pace, they also increase journalists' reliance on third-party technology companies to maintain the privacy of their data and the confidentiality of their sources.

A journalist's data is inevitably revelatory of core First Amendment protected activity. In many instances, effective reporting on matters of public concern depends on confidentiality and trust between

reporters and sources. News organizations must also keep reporting and journalistic work product confidential as they pursue and verify the accuracy of news stories.

Confidential sources have been critical to reporting on many of the major stories of public importance in the last half century, including, most famously, the Watergate scandal. *See* David Von Drehle, *FBI's No. 2 Was 'Deep Throat': Mark Felt Ends 30-Year Mystery of the Post's Watergate Source*, Wash. Post (Jun. 1, 2005), http://wapo.st/1ok8Zxe. Although using on-the-record sources is often journalistically preferable, "[a]nonymous sources are sometimes the only key to unlocking that big story, throwing back the curtain on corruption, fulfilling the journalistic missions of watchdog on the government and informant to the citizens." Michael Farrell, *Anonymous Sources*, https://perma.cc/5BQB-SRA3. Indeed, without confidential sources, journalists "would be relying on the official side of the story, and the official side of a story isn't always the whole side." Lana Sweeten-Shults, *Anonymous sources vital to journalism*, USA Today (Feb. 27, 2017), https://perma.cc/AV7V-Z4K8.

Accordingly, protecting confidential sources and the newsgathering process is a paramount concern for the press. Just as "'[a] free press is indispensable to the workings of our democratic society,'" "confidential sources are essential to the workings of the press." *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1183 (D.C. Cir. 2006) (Tatel, J., concurring) (quoting *Associated Press v. United States*, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring)).

Similarly, confidentiality is essential to ensuring the accuracy of the news. News organizations must keep drafts and other journalistic work product secret while they gather additional information and confirm a story's accuracy. For example, reporters from over a hundred news organizations, coordinated by the International Consortium of Investigative Journalists, worked for over a year in "top secret circumstances" using cloud-based tools to investigate stories based on the "Panama Papers," a trove of leaked documents from the firm Mossack Fonseca. Katie Van Syckle, *Panama Papers Explained: How Reporters Dug Through 11.5 Million Documents to Investigate Offshore Deals*, Variety (Apr. 5, 2016), https://perma.cc/TY95-C95S; *see also* Elisabeth Zerofsky, *How a German Newspaper Became the Go-To Place for Leaks Like the Paradise Papers*, The New Yorker (Nov. 11, 2017), https://perma.cc/4JP5-SXLX (explaining that in a similar investigative reporting project examining 13.4 million leaked files called the "Paradise Papers," journalists also worked in secret). The stories that were eventually published exposed the widespread and hidden use of offshore tax havens, and the Panama Papers investigation won the Pulitzer Prize for Explanatory Reporting. Michael Hudson, *Panama Papers Wins Pulitzer Prize*, Int'l Consortium of Investigative Journalists (Apr. 10, 2017), https://perma.cc/X527-7H2W.

In short, investigative reporting would be impossible without confidentiality. But a promise of confidentiality to a source or newsroom protocols to ensure the secrecy of drafts or newsgathering materials as a story is being crafted and

substantiated are worth little if a reporter's emails and electronic documents can be plucked from the cloud by simply compelling a third-party service provider to turn them over, without ever examining the First Amendment issues raised by such a compelled production.[3] Content data, as sought here, reveals the actual communications between a journalist and a source and drafts of stories or other journalist work product. Even a journalist's metadata can reveal the identity of a source and the stories on which a reporter is working; metadata can show when and where a source and a journalist communicated, the length of their phone calls, and how frequently they are in contact. It is therefore essential that technology companies safeguard journalists' data to protect the confidentiality of sources and newsgathering materials.

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[3] Even the threat of government surveillance undermines newsgathering. In 2013, for example, the Associated Press learned that the Justice Department had seized records from twenty AP telephone lines used by more than 100 AP reporters and editors. *See* Mark Sherman, *Gov't Obtains Wide AP Phone Records in Probe*, Associated Press (May 13, 2013), https://perma.cc/2P8J-RTPT. AP President and CEO Gary Pruitt discussed the impact of the surveillance during a speech at the National Press Club, explaining that, in some cases, sources "that we once checked in with regularly will no longer speak to us by phone and some are reluctant to meet in person." Lindy Royce-Bartlett, *Leak Probe Has Chilled Sources, AP Exec Says*, CNN (Jun. 19, 2013), https://perma.cc/VU8T-6HUP.

Investigative reporting is a necessary part of the fabric of an informed democratic society and fosters the civic literacy that forms the bedrock of democratic discourse. As this Court has recognized, a necessary corollary of the First Amendment right to publish news is a right to gather it: "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg*, 408 U.S. at 681. Indeed, the public's knowledge and understanding of the functioning of government today is owed to confidential communications and confidential newsgathering methods.

II. Expanding the U.S. government's ability to reach electronic records stored outside its borders sets a dangerous international example that foreign governments hostile toward journalists may exploit.

As organizations with reporting operations around the globe, *amici* are concerned not only about this case's potential impact on press protections within the U.S., but also about the possibility that it will introduce an international norm that would make journalists more vulnerable to global attacks on press freedom. Journalists already face unprecedented threats in other nations, and it is important that the United States continue to lead by example in supporting a free press. Broadening the government's ability to reach data stored overseas may embolden other nations to target journalists operating in those countries whose data is stored outside their borders, including journalists working for U.S. news outlets.

According to a Freedom of the Press report by Freedom House, press freedom is in decline globally. *See* Freedom of the Press 2017, *Press Freedom's Dark Horizon*, https://perma.cc/RW3D-8X9T. The United States has long stood as a bulwark against threats to free expression and a standard-bearer of press freedom. The United States champions press rights by publicly shaming nations that attack the press,[4] playing a role in the release of reporters imprisoned abroad,[5] funding independent media,[6] and passing legislation that secures journalist data,[7] among other

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[4] *See* Statement on World Press Freedom Day, The American Presidency Project (May 1, 2008), https://perma.cc/J6FV-BD9E (former President George W. Bush naming countries that harass and persecute journalists).

[5] *See* Jo Biddle, *AP, Freed Vietnam dissident heads to US*, Yahoo News (Oct. 24, 2014), https://yhoo.it/2Dw3hQB (reporting that Vietnam freed one of its most prominent bloggers from custody after former President Barack Obama raised the case); *Ethiopia: Free All Jailed Bloggers and Journalists Before Obama Visit*, Amnesty International (Jul. 9, 2015), http://bit.ly/2DzYKg6 (discussing the Ethiopian government's release of four journalists and two bloggers ahead of a visit by former President Obama).

[6] *See U.S. launches media fund for Hungary to aid press freedom*, Reuters (Nov. 13, 2017), https://perma.cc/EJ5R-UL44 (reporting that the State Department announced a fund for rural media in Hungary to train journalists in response to growing pressure and intimidation).

[7] *See* Jimmy Carter, Privacy Protection Act of 1980 Statement on Signing S. 1790 Into Law (Oct. 14, 1980), https://perma.cc/UN3U-5NNE (former President Jimmy Carter discussing the importance of safeguards for the free press and the administration's commitment to

activities. Just in December 2017, the Senate unanimously passed a resolution "recognizing the pervasive threats to freedom of the press around the world," and "call[ing] on governments to investigate and resolve cases of violence against journalists." *See* Press Release, Marco Rubio, Rubio, Casey, Wyden Press Freedom Resolution Passes Senate Unanimously (Dec. 20, 2017), https://perma.cc/AJ5G-D9NS.

These actions matter. In August 2017, for example, the State Department issued a statement urging the government of Azerbaijan to immediately release the editor-in-chief of the country's "only remaining independent media outlet." Statement on the Assault on Media Freedom in Azerbaijan, U.S. Dep't of State (Aug. 26, 2017), https://perma.cc/CDD8-43WQ. Weeks later, he was released. *See* Statement by the Spokesperson on the release of Mehman Aliyev, Council of Europe (Sept. 11, 2017), https://perma.cc/BJD7-3NEN.

Just as the United States leads by positive example, any erosion of press freedom domestically, such as through the loosening of conventions around access to data, could send the signal that other nations can get away with even more aggressive targeting of journalists. "[W]hen it comes to press freedoms, norms are just as important as laws." Joel Simon, *The world looks to America to defend press freedom*, CNN (Nov. 15, 2017), https://perma.cc/PFQ8-QC8A. If the United States obtains overseas data without going through

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"revers[ing] the historic growth in collection of personal data by the Government").

established international processes such as Mutual Legal Assistance Treaties ("MLATs"), other countries may also forego those processes.

Such a result will inescapably increase the pressure on technology companies like Microsoft to turn over U.S.-stored user data to other countries. To some extent, that's already happening: Lawyers for Microsoft pointed out to the district court that Chinese authorities raided four Microsoft locations, took servers from Microsoft's offices, and "demanded a password to seek e-mail information in the United States." *See* Joint App'x at 131; *see also* Resp. Br. 58 n. 8 (noting that as the current case was pending, Brazil tried to force Microsoft to produce data stored in the United States). Other companies like WhatsApp and Facebook,[8] Yahoo,[9] and Blackberry[10] have faced similar demands. Such unilateral demands from foreign countries for account owners' data may increase if the U.S. government's ability to reach data stored overseas is expanded.

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[8] Vinod Sreeharsha, *WhatsApp Is Briefly Shut Down in Brazil for a Third Time*, N.Y. Times (Jul. 19, 2016), https://nyti.ms/2kgZj3T (noting that Brazil repeatedly shut down WhatsApp and arrested a Facebook executive for not cooperating in a criminal investigation by turning over information from WhatsApp).

[9] Verne Kopytoff, *Are Google, Yahoo and Microsoft Living Up to Their Promises in China?* Time (Jan. 8, 2014), https://perma.cc/AS9U-AGT6 (noting that Yahoo turned over data to Chinese authorities that led to the arrest and imprisonment of dissents).

[10] Amar Toor, *BlackBerry won't be leaving Pakistan after all*, The Verge (Jan. 4, 2016), https://perma.cc/A53Y-GB6B (noting that Pakistan demanded backdoor access to user data from BlackBerry).

Companies like Microsoft rely on sovereignty principles to resist foreign government demands for data. *See, e.g.*, Joint App'x at 131. Broadening the ability of the U.S. government to access emails located outside its borders would undercut this reasoning and may encourage foreign countries to escalate the pressure on companies through fines or threats of criminal prosecution to compel compliance. If a U.S. court can compel a service provider to search and seize emails located anywhere in the world — without notice to the account owner or the sovereign nation where the emails and subscriber are located — other governments could demand the same response from those service providers' subsidiaries in their own countries. In addition to seeking records from email and cloud providers, government authorities may raid local news bureaus seeking access to the emails of reporters based in the United States.

These are not academic concerns. Journalists already face very real threats from foreign governments. Due to the press's institutional role as a check on government authority, both domestically and abroad, journalists are frequent targets of state-sanctioned suppression attempts and surveillance. Foreign governments surveil and harass the press by, *inter alia*, sponsoring hacking attempts on U.S. and foreign news media.[11] Indeed, two Google

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[11] *See, e.g.*, Daniel Lippman, *State-sponsored hackers targeting prominent journalists, Google warns*, Politico (Feb. 10, 2017), https://perma.cc/3SGX-ZHG3 (reporting that Google warned several journalists of attempts by state-sponsored hackers to steal their passwords and break into their inboxes); Raphael Satter, Jeff Donn, and

security engineers found in 2014 that "[t]wenty-one of the world's top-25 news organizations have been the target of likely state-sponsored hacking attacks." Jeremy Wagstaff, *Journalists, media under attack from hackers: Google researchers*, Reuters (Mar. 28, 2014), http://reut.rs/1l9SpbW.

Foreign governments monitor, intimidate, and retaliate against the press in other ways as well. For example, spyware sold to the Mexican government was used to target two of Mexico's most influential journalists who were reporting on government corruption, along with the son of one of the journalists. *See* Azam Ahmed and Nicole Perlroth, *Using Texts as Lures, Government Spyware Targets Mexican Journalists and Their Families*, N.Y. Times (Jun. 19, 2017), https://nyti.ms/2sGmhJ0. And in February 2017, it was revealed that Germany had

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Nataliya Vasilyeva, *Russian hackers hunted journalists in years-long campaign*, Associated Press (Dec. 22, 2017), https://perma.cc/D4EA-N244 (reporting that U.S.-based journalists were targeted by hackers suspected of association with the Russian government, and noting that journalists were the third-largest group on a hacking "hit list"); Chris Brummit, *Vietnam's 'cyber troops' take fight to U.S., France*, Wash. Examiner (Jan. 20, 2014), https://perma.cc/LY7V-7XPX (reporting that an Associated Press reporter based in Hanoi was targeted by hackers associated with the Vietnamese government); Nicole Perlroth, *Hackers in China Attacked the Times for Last Four Months*, N.Y. Times (Jan. 30, 2013), http://nyti.ms/1pVnfev (reporting that Chinese hackers targeted email accounts of *New York Times* reporters for months after the newspaper published an investigative report about the secret fortune accumulated by an outgoing Chinese leader).

been spying on foreign journalists since 1999. *See* Alison Smale, *Germany's Intelligence Service Spied on Journalists, Report Says*, N.Y. Times (Feb. 25, 2017), https://nyti.ms/2lH5SQG.

Amici recognize that law enforcement investigations must keep pace with the digital age, and electronic surveillance may be a necessary part of those investigations. But the example of the United States seizing electronic records stored outside its borders without going through established international processes may have the ripple effect of emboldening foreign countries to target journalists. *Amici* believe these potential unintended consequences should inform the case at hand.

III. There is a meaningful distinction between warrants and subpoenas that has long been central to U.S. press protections.

The U.S. Court of Appeals for the Second Circuit observed that interpreting the SCA to prohibit application of warrants to data stored in foreign countries not only complied with the presumption against extraterritoriality, it also avoided "unintended clashes between our laws and those of other nations . . ." *Matter of Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 829 F.3d 197, 210 (2d Cir. 2016) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). The Second Circuit's decision had another benefit: It avoided unintended clashes with domestic laws and procedures designed to protect the press by recognizing the meaningful distinction between warrants and subpoenas. The delineation between a warrant and a subpoena is not only

central to this case; it is also a critical to established press protections.

"[W]hen Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached" to that term." *Id.* at 212 (quoting *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1449 (2012)) (internal quotation marks and citations omitted). The term "warrant" carries with it a defined "cluster of ideas" — which include the understanding that it cannot be enforced extraterritorially. *See id.* ("[A] warrant protects privacy in a distinctly territorial way."); *see also* Resp. Br. 15. Nevertheless, Petitioner suggests that an SCA search warrant is akin to a subpoena during its execution. *See* Pet'r Br. 36 (stating that "[t]he execution of a[n SCA search warrant] thus functions like the execution of a subpoena"); *see also* Pet. App. 84a (magistrate judge below claiming that although an SCA search warrant is "obtained" like a "conventional warrant," "it is executed like a subpoena").

An entire regime of statutes and regulations exists in the U.S. guarding the media against overreaching government intrusion into newsgathering activities. The protections provided by this regime often depend on whether documents or other materials are sought from the press by warrant or by subpoena. By suggesting that an SCA warrant can be treated like a subpoena hybrid rather than a conventional search warrant, Petitioner muddles these long-defined terms and introduces needless uncertainty about the protections that U.S. law affords the press, despite the fact that Congress does not use these terms of art interchangeably.

For example, Congress recognized the importance of the subpoena-warrant distinction in enacting the Privacy Protection Act (PPA), 42 U.S.C. § 2000aa, which protects newsgathering material from search and seizure.[12] The PPA was enacted in response to the Supreme Court's decision in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), a case in which police executed a search warrant on the *Stanford Daily's* newsroom. *See* S. Rep. No. 96-874, at 4 (1980), reprinted in 1980 U.S.C.C.A.N. 3950, 3950 (1980). The PPA illustrates that Congress distinguishes between the terms "warrant" and "subpoena" when legislating to protect sensitive reporting material. Indeed, the statute's mechanics clearly differentiate between warrants and subpoenas — prohibiting search and seizure of work product and newsgathering materials by warrant, except in rare instances, and requiring a "subpoena-first" approach for documentary materials. 42 U.S.C. § 2000aa(a), (b).

First, the PPA bans searches where the materials sought are "work product" materials.[13] 42 U.S.C.

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[12] *See* U.S. Dep't of Justice, Computer Crime and Intellectual Property Section, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, Chapter 2 § F(1) (3d ed. 2009), https://perma.cc/LV7C-84W5 (citing to the PPA's legislative history and noting that "[t]he statute was intended to grant publishers certain statutory rights to discourage law enforcement officers from targeting publishers simply because they often gathered 'mere evidence' of crime").

[13] The statute defines "work product" materials to include materials that are "prepared, produced, authored, or

§ 2000aa(a) (making it unlawful "to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication"); *see also* S. Rep. No. 96-874, at 9, 1980 U.S.C.C.A.N. at 3956 ("When the materials sought consist of work product, a general no-search rule applies.").

Second, the PPA enacts a "subpoena-first" rule where the government seeks "documentary materials."[14] 42 U.S.C. § 2000aa(b)(3)–(4) (explaining that the general prohibition on search and seizure of documentary materials may not apply under certain circumstances when the documents cannot be obtained by a subpoena duces tecum); S. Rep. No. 96-874, at 9, 1980 U.S.C.C.A.N. at 3956 ("When the materials sought constitute documentary materials other than work product, a subpoena-first rule is generally applicable."). In narrow circumstances where materials cannot be obtained by subpoena and delay would "threaten the interests of justice," the government may proceed by warrant

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created" in anticipation of dissemination to the public and which reflect the preparing party's "mental impressions, conclusions, opinions, or theories." 42 U.S.C. § 2000aa-7(b).

[14] The statute defines "documentary materials" to include "materials upon which information is recorded" — such as photographs, video, audio recordings, and printed materials — that are gathered in anticipation of publication, but which are not created in anticipation of publication and do not reflect the author's mental impressions. 42 U.S.C. § 2000aa-7(a).

only if it provides the person possessing the materials an opportunity to contest the seizure in court. 42 U.S.C. § 2000aa(b)(4)(c).[15]

Treating a warrant like a subpoena in this case, as the government urges, would introduce uncertainty into this differentiation. One question, among others, would be how the PPA would apply to such a warrant-subpoena hybrid, or if the government would take the position that it would not apply at all.

In the past, the government has demonstrated that it considers SCA warrants to trigger the PPA's restrictions. In 2010, the government was investigating an alleged unauthorized disclosure of classified information about North Korea to Fox News journalist James Rosen. *See* Ann E. Marimow, *A Rare Peek into a Justice Department Leak Probe*, Wash. Post (May 19, 2013), http://wapo.st/N1Qzh6. In support of an application for a search warrant to search Rosen's email, the government submitted an affidavit invoking *both* the SCA and the PPA. *See* Affidavit of Reginald B. Reyes in Support of Application for Search Warrant, ECF No. 20-1, *Application for Search Warrant for E-Mail Account [REDACTED]@gmail.com Maintained on Computer Servers Operated by Google, Inc.*, No. 10-mj-291 ¶ 3 (D.D.C. Nov. 7, 2011) . The government addressed the PPA's general prohibition against warrant-based

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[15] The PPA also contains a narrow "suspect" exception that allows the government to proceed by warrant if there is probable cause to believe the person possessing the materials committed a crime and the materials relate to that crime. 42 U.S.C. § 2000aa(a)(1), (b)(1).

searches and seizures of newsrooms by alleging that the PPA's narrow "suspect" exception applied because Rosen was suspected of violating the Espionage Act as an "aider and abettor and/or co-conspirator." *Id.* ¶¶ 5, 8. Rosen's case demonstrates that, in the past, the government has treated SCA warrants like conventional warrants, subject to the PPA's protections. *See* Michael Isikoff, *DOJ confirms Holder OK'd search warrant for Fox News reporter's emails*, NBC News (May 23, 2013), https://perma.cc/7P5L-2EBM (reporting that the government stated that the warrant was intended to comply with the PPA).

Other examples illustrate that, contrary to the government's position in this case, the government recognizes that different SCA tools — *i.e.*, court orders, warrants, or subpoenas — are distinct, with different scopes and applications. For example, in 2012 and 2013, the government was investigating the alleged leak of information about a foiled bomb plot in Yemen by a former FBI agent to the Associated Press. As part of its investigation, the government sought both a court order issued pursuant to Section 2703(d) of the SCA (a "Section 2703(d) order") and a subpoena issued pursuant to SCA requirements to obtain different types of records of the news media.

According to judicial records that the Reporters Committee successfully petitioned to have unsealed, the government sought metadata about a reporter's emails through a Section 2703(d) order, though the order was never executed. *See* Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d), *In re Application of the United States of*

American for an Order Pursuant to 18 U.S.C. § 2703(d), No. 13-mc-460, ECF No. 1 ¶ 31 (D.D.C. May 7, 2013) (showing that the target email account was used by a reporter); *id.* at ECF No. 2 (D.D.C. May 7, 2013) (court order showing in Attachment A that the government sought metadata records); *id.* at ECF No. 12 (D.D.C. May 20, 2013) (moving to vacate the order). In addition, the government also secretly obtained two months' worth of telephone records for Associated Press reporters using a subpoena. *See* Sari Horwitz, *Under sweeping subpoenas, Justice Department obtained AP phone records in leak investigation*, Wash. Post (May 13, 2013), http://wapo.st/2BZDeDq.[16]

Thus, by employing search warrants, Section 2703(d) orders, and subpoenas issued pursuant to the SCA to obtain different types of records in the Rosen and AP examples, the government showed that its policies and procedures recognize distinctions between different SCA tools, including the distinctions between warrants and subpoenas. The government's suggestion that the Court treat an SCA warrant like a subpoena or subpoena-warrant

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[16] The government has also recognized the distinction between subpoenas and warrants in the Justice Department's internal policy on protections for the news media from legal demands from prosecutors. *See* 28 C.F.R. § 50.10. That policy turns on distinctions between "subpoenas" — which are grouped with civil investigative demands, pen register orders under 18 U.S.C. § 3123, and court orders issued pursuant to Section 2703(d) of the SCA (*see* 28 C.F.R. § 50.10(b)(2)(i)) — and "warrants," which include SCA warrants, *see* 28 C.F.R. § 50.10(b)(2)(ii).

"hybrid" would introduce needless uncertainty about these long-defined and critically important terms.

These distinctions between different types of legal process are a restraint on government power and therefore critical to the protections provided to the news media. To hold that a "warrant" is not always a "warrant" would, in effect, rewrite the SCA and threaten to erode along with it other legal constraints that have shielded the press from government intrusion. Just as the protection of journalists' records should not depend on who is storing them or where they are stored, the legal climate in which reporters operate must have established rules governing law enforcement access to data that are scrupulously followed.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court consider the impact on press protections in resolving the question presented.

Respectfully submitted,

Bruce D. Brown
Counsel of Record
Caitlin Vogus
Selina MacLaren
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1250
Washington, D.C. 20005
bbrown@rcfp.org
(703) 795-9300

Laura R. Handman
Alison Schary
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Ave. NW,
Suite 800
Washington, D.C. 20006
laurahandman@dwt.com
(202) 973-4200

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APPENDIX A: DESCRIPTIONS OF *AMICI*

Advance Publications, Inc., directly and through its subsidiaries, publishes more than 20 print and digital magazines with nationwide circulation, local news in print and online in 10 states, and leading business journals in over 40 cities throughout the United States. Through its subsidiaries, Advance also owns numerous digital video channels and internet sites and has interests in cable systems serving over 2.3 million subscribers.

ALM Media, LLC publishes over 30 national and regional magazines and newspapers, including *The American Lawyer*, *The National Law Journal*, *New York Law Journal* and *Corporate Counsel*, as well as the website Law.com. Many of ALM's publications have long histories reporting on legal issues and serving their local legal communities. ALM's *The Recorder*, for example, has been published in northern California since 1877; *New York Law Journal* was begun a few years later, in 1888. ALM's publications have won numerous awards for their coverage of critical national and local legal stories, including many stories that have been later picked up by other national media.

With some 500 members, American Society of News Editors ("ASNE") is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922 as American Society of Newspaper Editors, ASNE is active in a number of areas of

interest to top editors with priorities on improving freedom of information, diversity, readership and the credibility of newspapers.

The Associated Press Media Editors is a nonprofit, tax-exempt organization of newsroom leaders and journalism educators that works closely with The Associated Press to promote journalism excellence. APME advances the principles and practices of responsible journalism; supports and mentors a diverse network of current and emerging newsroom leaders; and champions the First Amendment and promotes freedom of information.

Association of Alternative Newsmedia ("AAN") is a not-for-profit trade association for 130 alternative newspapers in North America, including weekly papers like The Village Voice and Washington City Paper. AAN newspapers and their websites provide an editorial alternative to the mainstream press. AAN members have a total weekly circulation of seven million and a reach of over 25 million readers.

Cable News Network, Inc. ("CNN"), a division of Turner Broadcasting System, Inc., a Time Warner Company, is the most trusted source for news and information. Its reach extends to the following: nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; CNN Digital Network, the No. 1 network of news websites in the United States; CNN Newsource, the world's most extensively syndicated news service; and strategic international partnerships within both television and the digital media.

The Center for Investigative Reporting (CIR), founded in 1977, is the nation's first nonprofit investigative journalism organization. CIR produces investigative journalism for its https://www.revealnews.org/ website, the Reveal national public radio show and podcast, and various documentary projects - often in collaboration with other newsrooms across the country.

The Committee to Protect Journalists is an independent, nonprofit organization that promotes press freedom worldwide. We defend the right of journalists to report the news without fear of reprisal. CPJ is made up of about 40 experts around the world, with headquarters in New York City. A board of prominent journalists from around the world helps guide CPJ's activities.

Daily News, LP publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is the ninth-largest paper in the country by circulation. The Daily News' website, NYDailyNews.com, receives approximately 26 million unique visitors each month.

The E.W. Scripps Company serves audiences and businesses through television, radio and digital media brands, with 33 television stations in 24 markets. Scripps also owns 33 radio stations in eight markets, as well as local and national digital journalism and information businesses, including mobile video news service Newsy and weather app developer WeatherSphere. Scripps owns and operates an award-winning investigative reporting newsroom in Washington, D.C. and serves as the

long-time steward of the nation's largest, most successful and longest-running educational program, the Scripps National Spelling Bee.

The European Publishers Council is a high-level group of 26 Chairmen and CEOs of leading European news media corporations actively involved in multimedia markets with print and digital newspapers, magazines, books journals and database publishers, radio and TV broadcasting, available across all platforms and devices.

First Amendment Coalition is a nonprofit public interest organization dedicated to defending free speech, free press and open government rights in order to make government, at all levels, more accountable to the people. The Coalition's mission assumes that government transparency and an informed electorate are essential to a self-governing democracy. To that end, we resist excessive government secrecy (while recognizing the need to protect legitimate state secrets) and censorship of all kinds.

First Look Media Works, Inc. is a new non-profit digital media venture that produces The Intercept, a digital magazine focused on national security reporting.

Forbes Media LLC is the publisher of Forbes Magazine and Forbes Asia, as well as an array of investment newsletters and the leading business website, Forbes.com. Forbes has been covering American and global business since 1917.

Fox News Network LLC ("Fox News") owns and operates the Fox News Channel, the top rated 24/7

all news national cable channel, and the Fox Business Network, as well as Foxnews.com, Foxbusiness.com, and the Fox News Radio Network.

Freedom of the Press Foundation is a non-profit organization that supports and defends public-interest journalism focused on transparency and accountability. The organization works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including public advocacy, legal advocacy, the promotion of digital security tools, and crowd-funding.

Gannett Co., Inc. is an international news and information company that publishes 109 daily newspapers in the United States and Guam, including USA TODAY. Each weekday, Gannett's newspapers are distributed to an audience of more than 8 million readers and the digital and mobile products associated with the company's publications serve online content to more than 100 million unique visitors each month.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Investigative Reporting Workshop, a project of the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about

government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The McClatchy Company is a 21st century news and information leader, publisher of iconic brands such as the Miami Herald, The Kansas City Star, The Sacramento Bee, The Charlotte Observer, The (Raleigh) News and Observer, and the (Fort Worth) Star-Telegram. McClatchy operates media companies in 28 U.S. markets in 14 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, Calif., and listed on the New York Stock Exchange under the symbol MNI.

The Media Institute is a nonprofit research foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

The Media Law Resource Center, Inc. ("MLRC") is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and

policy proposals, and speaks to the press and public on media law and First Amendment issues. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

MPA – The Association of Magazine Media, ("MPA") is the largest industry association for magazine publishers. The MPA, established in 1919, represents over 175 domestic magazine media companies with more than 900 magazine titles. The MPA represents the interests of weekly, monthly and quarterly publications that produce titles on topics that cover politics, religion, sports, industry, and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

National Public Radio, Inc. (NPR) is an award-winning producer and distributor of noncommercial

news, information, and cultural programming. A privately supported, not-for-profit membership organization, NPR serves an audience of more than 26 million listeners each week via more than 1000 noncommercial, independently operated radio stations, licensed to more than 260 NPR Members and numerous other NPR-affiliated entities. In addition, NPR is reaching an expanding audience via its digital properties, including NPR.org and NPR's applications, which see more than 30 million unique visitors each month. National Public Radio, Inc. has no parent company and issues no stock.

The News Media Alliance is a nonprofit organization representing the interests of online, mobile and print news publishers in the United States and Canada. Alliance members account for nearly 90% of the daily newspaper circulation in the United States, as well as a wide range of online, mobile and non-daily print publications. The Alliance focuses on the major issues that affect today's news publishing industry, including protecting the ability of a free and independent media to provide the public with news and information on matters of public concern.

The News Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The News Guild is a sector of the Communications Workers of America. CWA is America's largest communications

and media union, representing over 700,000 men and women in both private and public sectors.

Online News Association ("ONA") is the world's largest association of online journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. ONA's more than 2,000 members include news writers, producers, designers, editors, bloggers, technologists, photographers, academics, students and others who produce news for the Internet or other digital delivery systems. ONA hosts the annual Online News Association conference and administers the Online Journalism Awards. ONA is dedicated to advancing the interests of digital journalists and the public generally by encouraging editorial integrity and independence, journalistic excellence and freedom of expression and access.

PEN American Center ("PEN America") is a non-profit association of writers that includes novelists, journalists, editors, poets, essayists, playwrights, publishers, translators, agents, and other professionals. PEN America stands at the intersection of literature and human rights to protect open expression in the United States and worldwide. We champion the freedom to write, recognizing the power of the word to transform the world. Our mission is to unite writers and their allies to celebrate creative expression and defend the liberties that make it possible, working to ensure that people everywhere have the freedom to create literature, to convey information and ideas, to express their views, and to make it possible for everyone to access the views, ideas, and literatures of others. PEN America has approximately 5,000 members and is affiliated

with PEN International, the global writers' organization with over 100 Centers in Europe, Asia, Africa, Australia, and the Americas.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Reporters Committee for Freedom of the Press is an unincorporated nonprofit association of reporters and editors dedicated to safeguarding the First Amendment rights and freedom of information interests of the news media. Since 1970, the Reporters Committee has represented the interests of the press and the public in cases involving significant freedom of expression issues, including in this Court.

Reporters Without Borders has been fighting censorship and supporting and protecting journalists since 1985. Activities are carried out on five continents through its network of over 150 correspondents, its national sections, and its close collaboration with local and regional press freedom groups. Reporters Without Borders currently has 10 offices and sections worldwide.

The Seattle Times Company, locally owned since 1896, publishes the daily newspaper *The Seattle Times*, together with *The Issaquah Press*, *Yakima*

Herald-Republic, *Walla Walla Union-Bulletin*, *Sammamish Review* and *Newcastle-News*, all in Washington state.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Thomson Reuters Markets is a subsidiary of Reuters, the world's largest international news agency, is a leading provider of real-time multi-media news and information services to newspapers, television and cable networks, radio stations and websites around the world. Through Reuters.com, affiliated websites and multiple online and mobile platforms, more than a billion professionals, news organizations and consumers rely on Reuters every day. Its text newswires provide newsrooms with source material and ready-to-publish news stories in twenty languages and, through Reuters Pictures and Video, global video content and up to 1,600 photographs a day covering international news, sports, entertainment, and business. In addition, Reuters publishes authoritative and unbiased market data and intelligence to business and finance consumers, including investment banking and private equity professionals.

tronc, Inc. is one of the country's leading media companies. The company's leading daily newspapers include the Los Angeles Times, Chicago Tribune, New York Daily News, San Diego Union-Tribune, The Baltimore Sun, Sun Sentinel (South Florida), Orlando Sentinel, Hartford Courant, The Morning Call and Daily Press. Popular news and information websites, including www.chicagotribune.com and www.latimes.com, complement tronc's publishing properties and extend the company's nationwide audience.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

Verband Deutscher Zeitschriftenverleger ("VDZ") is the umbrella organization of the German Magazine Publishers Association, an organization of 400 publishers producing more than 3,000 titles in print and digital. VDZ represents 90 percent of the German magazine publishing market.

VICE Media is the world's preeminent youth media company. It is a news, content and culture hub, and a leading producer of award-winning video, reaching young people on all screens across an unrivaled global network.

Vox Media owns several web sites, including Vox, The Verge, SB Nation, and Recode, with 170 million unique monthly visitors.

WP Company LLC publishes The Washington Post, the leading daily newspaper in the nation's capital, as well as the website

www.washingtonpost.com, which reaches more than 65 million unique visitors per month.

APPENDIX B: ADDITIONAL *AMICI* COUNSEL

Richard A. Bernstein
Sabin, Bermant & Gould LLP
One World Trade Center
New York, NY 10007
Counsel for Advance Publications, Inc.

Dana Rosen
Senior Vice President and General Counsel
ALM Media, LLC
120 Broadway, 5th Floor
New York, NY 10271

Kevin M. Goldberg
Fletcher, Heald & Hildreth, PLC
1300 N. 17th St., 11th Floor
Arlington, VA 22209
Counsel for American Society of News Editors
Counsel for Association of Alternative Newsmedia

David C. Vigilante
Johnita P. Due
Cable News Network, Inc.
1 CNN Center
Atlanta, GA 30303

D. Victoria Baranetsky
General Counsel
The Center for Investigative Reporting
1400 65th Street, Suite 200
Emeryville, California 94608

Matthew Leish
Vice President & Deputy General Counsel
Daily News, LP

4 New York Plaza
New York, New York 10004

David M. Giles
Vice President/
Deputy General Counsel
The E.W. Scripps Company
312 Walnut St., Suite 2800
Cincinnati, OH 45202

David Snyder
First Amendment Coalition
534 Fourth St., Suite B
San Rafael, CA 94901

David Bralow
First Look Media Works, Inc.
18th Floor
114 Fifth Avenue
New York, NY 10011

MariaRosa Cartolano, General Counsel
Jessica Bohrer, Vice President, Editorial Counsel
Forbes Media LLC
60 Fifth Avenue
New York, NY 10011

Lesley West
Executive Vice President
Legal and Business Affairs
Fox News / Fox Business
1211 Avenue of the Americas, 15th Floor
New York, New York 10036

Marcia Hofmann
Counsel for Freedom of the Press Foundation

25 Taylor Street
San Francisco, CA 94012

Barbara W. Wall
Senior Vice President & Chief Legal Officer
Gannett Co., Inc.
7950 Jones Branch Drive
McLean, VA 22107
(703)854-6951

Juan Cornejo
The McClatchy Company
2100 Q Street
Sacramento, CA 95816

George Freeman
Media Law Resource Center
520 Eighth Avenue
North Tower, 20th Floor
New York, NY 10018
Telephone: (212) 337-0200
Telecopier: (212) 337-9893
Email: gfreeman@medialaw.org

James Cregan
Executive Vice President
MPA – The Association of Magazine Media
1211 Connecticut Ave. NW Suite 610
Washington, DC 20036

Mickey H. Osterreicher
1100 M&T Center, 3 Fountain Plaza,
Buffalo, NY 14203
Counsel for National Press Photographers Association

Jonathan Hart

Ashley Messenger
Micah Ratner
National Public Radio, Inc.
1111 North Capitol St. NE
Washington, D.C. 20002

Barbara L. Camens
Barr & Camens
1025 Connecticut Ave., NW
Suite 712
Washington, DC 20036
Counsel for The Newspaper Guild – CWA

Katherine Glenn Bass
588 Broadway, Suite 303Â
New York, NY 10012
Counsel for PEN America

Kathleen A. Kirby
Wiley Rein LLP
1776 K St., NW
Washington, DC 20006
Counsel for Radio Television Digital News Association

Bruce W. Sanford
Mark I. Bailen
Baker & Hostetler LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, DC 20036
Counsel for Society of Professional Journalists

Gail C. Gove
Chief Counsel, News
Katharine Larsen

Counsel, News
Reuters America LLC
3 Times Square, 20th Floor
New York, NY 10036

Professor Dr. Christoph Fiedler
VERBAND DEUTSCHER
ZEITSCHRIFTENVERLEGER (VDZ)
Markgrafenstrae 15, D-10969
Berlin, Germany
Counsel for Verband Deutscher Zeitschriftenverleger
(VDZ), the German Magazine Publishers Association

Jon Lutzky
General Counsel
VICE Media
49 South 2nd Street
Brooklyn, NY 11249
718-215-5700

Lauren Fisher
Chief Legal Officer
Vox Media
1201 Connecticut Ave. NW, Floor 11
Washington, DC 20036

Jay Kennedy
James A. McLaughlin
Kalea S. Clark
The Washington Post
One Franklin Square
Washington, D.C. 20071
Tel: (202) 334-6000
Fax: (202) 334-5075